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JAMES H. McKENNEY,
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No. 1000.

THE DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

ELIZABETH L. W. BAILEY, Administratrix of DAVID W. BAILEY, Deceased.

No. 1001.

ELIZABETH L. W. BAILEY, Administratrix of DAVID W. BAILEY, Deceased, Plaintiff in Error,

vs.

THE DISTRICT OF COLUMBIA.

In Error to the Court of Appeals of the District of Columbia.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
For District of Columbia, Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 390.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

ELIZABETH L. W. BAILEY, ADMINISTRATRIX OF DAVIS W. BAILEY, DECEASED.

No. 420.

ELIZABETH L. W. BAILEY, ADMINISTRATRIX OF DAVIS W. BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR THE DISTRICT OF COLUMBIA.

This was an action brought in the supreme court of the District of Columbia to recover against the District the sum of $10,519.20, with interest thereon, from July 18, 1892, upon an alleged award of J. J. Johnson for that sum. The District of Columbia appeared by its attorney and pleaded:

1. That the plaintiff and the defendant did not argue

to submit the matters of difference between them to the award and arbitrament of said Johnson.

2. That the said Johnson did not make an award of and concerning said matters of difference.

3. That Davis W. Bailey, the plaintiff's intestate, on February 24, 1883, brought an action in the supreme court of the District of Columbia to recover $25,000 damages for an alleged breach of contract for resurfacing with asphaltum certain streets and avenues in the city of Washington in the year 1879. That the District of Columbia filed pleas to said action, and issue was joined thereon and the same was calendared for trial; that on the death of said Davis W. Bailey, in 1883, said action was revived in the name of his administratrix, the present plaintiff; that afterwards, on July 18, 1892, without an order of said court, as required by its forty-seventh common-law rule, the said Johnson assumed, without authority of law, to make and file in the cause a report, in which he found $10,519.20 against the District in favor of the plaintiff; that the defendant filed exceptions to the said report and the plaintiff moved for judgment thereon, which motion is still pending and undisposed of; that said cause is numbered 24,279 on the law side of said court and is made a part of this case by reference; that the alleged award by Johnson was not under seal and was never delivered to the defendant; and that the District never undertook and promised in manner and form as alleged; and that it was not indebted as alleged.

The merits of the case are briefly and concisely stated by Captain F. V. Greene, assistant to the Engineer Commissioner, in a report made thereon March 10, 1883, which it was agree should be received in evidence before Mr. Johnson, with the same effect as if

Captain Greene had appeared and testified to the facts therein stated.

Captain Greene was on duty as an assistant to the Engineer Commissioner at the time, and was familiar with all of the details of the work, the same having been done under his immediate supervision. He says: (Rec. 75.)

WASHINGTON, D. C., March 10, 1883.

Major G. J. Lydecker, Corps of Engineers, U. S. A.,
Engineer Commissioner, D. C.:

MAJOR: In the matter of the suit of D. W. Bailey for $20,000 damages for non-fulfillment of contract, I have the honor to make the following report as a basis of defense:

On the 30th of July, 1879, a contract was awarded to the *Bailey-French Paving Company*, per D. W. Bailey, agent, for resurfacing certain streets. Copy of contract herewith. The estimated amount of work was 45,537 square yards, on which the contract price varies, with different streets, from 83 cents to $1.05 per square yard, amounting to $40,950.86 in all. The conditions of the contract required the contractor to do any extra work that might become necessary in consequence of change of plans during the progress of the work. Such a change became necessary. It had been originally intended to stop the resurfacing within about two feet of the gutter, leaving a beveled edge; between this and the curb the old pavement was not to be touched. Where the old pavement showed a sufficient amount of curb to take the new pavement it was intended to lay the new pavement up to the curb. It was found in fact that in very few cases was there enough showing of curb to admit a new pavement, and that the proposed beveled edge would not be durable. Another plan was, therefore, adopted

and the contractor notified to execute it. He made no protest and did execute it. This plan was to cut out the old pavement for a sufficient width from the curb, excavate a certain amount of earth under it, so as to lower the grade, and then lay an entirely new pavement in the gutter. For this the contractor was paid at fair rates, much more remunerative in fact, than his rates for resurfacing.

The extra work on this contract and others for similar work, increased the cost of all the resurfacing done in that year. The appropriation being for a specific amount of money, the Commissioners had no discretion to go beyond that amount, and of course the amount of work had to be reduced. Mr. Bailey was therefore notified on February 12, 1880, that so much of his contract as applied to Mount Vernon square, from Seventh to Ninth streets west, and Pennsylvania avenue, from Sixth to Eighth streets east, was revoked, as the Commissioners would have no funds to pay for those streets. This is the entire history of the transaction. Owing to a necessary change of plans, a portion of the work had to be omitted for lack of funds to pay for it.

The item of $20,000 damages is simply preposterous. The whole amount of his contract was only a little more than $40,000, and he executed about three-fourths of it as originally designed, the amount revoked being only about $10,000; on this latter amount he was to make a profit of $20,000 if his statement of damages be correct. In fact, however, Mr. Bailey was paid $5,748.14 for his extra work, making the total amount received by him under his contract $35,953.18, against an estimated amount, when the contract was signed, of $40,950.86. The difference of about $5,000 is not unusual as between the estimated

and actual amount of work. Mr. Bailey was paid in full for all work done by him and at the rates named in the contract, which he voluntarily proposed and signed.

If this suit is pressed, attention should be drawn to the fact that Bailey did not execute his part of the contract. He contracted to finish all the work in 120 days from July 30, 1879. In fact, he did not complete so much as he was allowed to execute in less than 230 days from July 30, to wit, on or about February 20, 1880, and thereby subjected the District to great annoyance and positive loss in the employment of inspectors for a longer time than was absolutely necessary for the work.

Moreover, the work was in places badly done and was not kept in repair as agreed upon in the contract by said Bailey, so that the District was forced to make repairs at an expense of $1,012.30, for which I believe suit is now pending against said Bailey. The papers were sent to the attorney about a year ago.

Very respectfully,

F. V. GREENE,
Captain Engineers, U. S. A.

"It was agreed that this letter should be received in evidence, and have the same force and effect as if Captain Greene had testified to the facts therein under oath.

"J. J. JOHNSON,
"Referee."

The original action was to recover damages for breach of contract for resurfacing asphaltum pavements, the alleged breach consisting in the rescinding, by the Commissioners, of the plaintiff's contract and refusing to pay him the money the District

had agreed to pay him. Before the referee, Mr. Williamson, counsel for the plaintiff, in opening the case (Rec. 47), stated that the claim was for resurfacing certain streets and parts of streets with asphaltum under contract No. 222, between the *District of Columbia and the "Bailey-French Paving Company*, in 1879; that *Bailey* complied with all the requirements specified *in said contract* until he had completed something over one-half of the work, when the Commissioners sent him a letter, dated February 12, 1880, rescinding the unexecuted balance of the contract; that when the contract was rescinded the contractor was in a position to continue and complete the work; that he had on hand a large quantity of material and machinery, which was nearly a complete loss, and that in addition he claimed for *one-half inch extra surface*, and that the *entire claim* was for that one-half inch extra surface and on the unexecuted part of the contract."

The fact is, the so-called award of Mr. Johnson was based on a claim by *Davis W. Bailey*, individually, against the District for alleged breach of a contract between the District and the *"Bailey-French Paving Company,"* of which he was, as stated in the declaration, only the *agent*. The contract did not provide for *extra work*, but, on the contrary, stipulated that no claim for extra work should be made unless such work was first ordered by the Commissioners *in writing*. Extra work amounting to $5,748.14 was ordered and paid for, yet the referee allowed $6,079.05 for extra work, which could not have been recovered in any view of the case, for there was no pretense that there was any contract for extra work unless ordered by the Engineer Commissioner, and $4,440.15 for alleged profits on the unexecuted balance of the contract. In

other words, in a case in which it was manifest there could be no recovery because there were no contract relations between the parties, the referee found the District of Columbia indebted to a man who never claimed to be anything more than an *agent* of the contractor, in the sum of $10,519.20.

The original and sole counsel for the appellee before the referee was Mr. W. Preston Williamson, who represented her down to and including the time of filing a motion for judgment on said report, pursuing the well-understood agreement of parties that Mr. Johnson was only to make a *report*, which was to be *advisory to the court*, and simply a step in the cause.

Thereupon additional counsel was procured and an action brought on said report on the theory that it was a common law award and operated to discontinue the original case in which it had been filed, and this in defiance of the fact that the first case down to the time of trial of the case was pending on the appellant's motion for judgment on said report.

The present counsel for the District took no part in the proceedings before Mr. Johnson, referee, and knew nothing of them until after he had filed his report.

ASSIGNMENT OF ERRORS.

The court below erred—

1. In sustaining the consolidation of the two causes.

2. In holding that oral testimony was admissible to show that the intention of the Commissioners of the District of Columbia, and the defendant in error, was to submit the case to arbitration, the alleged agreement of the parties to refer the cause being in writing.

3. In holding that the report of the referee was properly read in evidence, without including the papers and evidence attached thereto, and filed therewith, by the referee as part of his report.

4. In holding that the evidence attached to and forming part of the report of Mr. Johnson, referee, was properly excluded from the consideration of the jury.

5. In holding that the report of the referee was admissible in evidence as an award.

6. In granting the plaintiff's first prayer. (Rec. 40.)

7. In refusing to direct a verdict for the defendant. (Rec. 41.)

8. In refusing to grant the defendant's third prayer, that the Commissioners were without authority to agree to submit the matters in controversy to the final award of an arbitrator. (Rec. 41.)

9. In refusing to grant the defendant's fifth prayer, (Rec. 42), that the plaintiff, as administratrix of her deceased husband, had no authority to agree to submit the claim to arbitration.

POINTS AND AUTHORITIES.

I.

It was error to consolidate the two causes; they were not of a like nature, nor did they relate to the same question; one was to recover *damages* for an alleged breach of contract, while the other was *debt* upon an alleged award. If the report of Mr. Johnson

was an award, then it operated to discontinue the original action, and for that reason it was improper to consolidate the causes, there being nothing in dispute to try in the original cause. There were *not* two causes of action pending. Either the first cause was discontinued by operation of law or it was pending with the report of the referee in it to be disposed of. If it was discontinued it was dead, and it was plainly error to consolidate it with a new cause. If it was pending it was likewise error, since in that event the second cause was non-existent, because no cause of action existed. The manifest effect of consolidating the two causes, if they were not of a nature to be consolidated, was to confuse the jury by a multiplication of dissimilar issues. In one case the issue was breach of contract or no, while in the other it was award or no. It is immaterial that the judge in his general charge to the jury undertook to relieve the case of this embarrassment by directing a verdict for the defendant in the original case.

Under the proceedings resorted to in this litigation the defense of a "former suit pending" is of no avail whatever, for by the order consolidating the two cases that defense was effectually obliterated.

II.

The agreement of the parties to refer the cause to Mr. Johnson as referee being in writing, if Mr. Williamson's letter (Rec. 18), and the Commissioners' order (Rec. 20), constituted such agreement, oral evidence was inadmissible to show the intention of the parties; that must be gathered from the writings themselves. It is manifest that the purpose of introducing oral evidence on the subject was to supplement the writing and supply a deficiency which the appellee deemed

necessary in order to show an intention to submit to arbitration.

A written submission cannot be varied by parol evidence. Neither is it competent to show by parol evidence what the written submission in fact was.

Efner *vs.* Shaw, 2 Wend., 567.
MeNear *vs.* Bailey, 18 Maine, 251.
DeLong *vs.* Stanton, 9 Johns, 28.

In this respect the general law concerning contracts applies without modification.

Morse on Arbitration and Award, 63.

A memorandum of an agreement to refer is wholly superseded by a subsequent complete reference of submission. And the verbal agreement made prior to, or contemporaneously with, a written submission is merged in the latter.

Morse on Arbitration and Award, 63.
Billington *vs.* Sprague, 22 Me., 34.
Loring *vs.* Alden, 3 Metc. (Mass.), 576.
Symonds *vs.* Mayo, 10 Cush., 39.
Palmer *vs.* Greene, 6 Conn., 14.

A case submitted to arbitration *pendente lite* will in no case be considered discontinued where the terms of the submission show the intention of the parties not to discontinue.

Jacoby *vs.* Johnson, 1 Hun., 242.
Hearne *vs.* Brown, 67 Me., 156.
Ensign *vs.* St. Louis, etc., R. Co., 62 How. Pr. (N. Y.), 123.

The object of a reference in this case was to terminate the litigation in the original cause, not to begin new litigation. This is shown by the order of the Commissioners appointing Mr. Johnson referee (Rec. 20) and the subsequent proceedings in the original cause. The referee made his report and filed it in the original cause, together with the testimony on which he based it; the defendant filed exceptions to that report (Rec. 34), and the appellee (Rec. 34) moved for judgment in the original cause, and subsequently (Rec. 35) moved the court to confirm the award of the arbitrator, J. J. Johnson, and enter judgment thereon. All this was consistent with the order of the Commissioners appointing Mr. Johnson referee. There was no intention to discontinue the cause and submit the matters of difference between the parties to arbitration. The matter was depending in court, and both parties took action in regular course therein, such action being a matter of record, and we submit that it is incompetent, by oral testimony, to nullify the acts of record of the parties in a pending cause.

As was said by the court below in its opinion disposing of this case on the first appeal (4 App. D. C., 368), "To discontinue the pending case, leaving the successful party to his action on the award, is simply to make the award the beginning of a new litigation instead of terminating the old. Both reason and policy would seem to oppose such practice."

The practical interpretation put upon the agreement by the parties was that the referee was to make a report only. This controls.

Chicago *vs.* Sheldon, 9 Wall., 54.

III. AND IV.

It was error to admit a part only of Mr. Johnson's report. The documents and evidence attached to that report were necessarily a part of it. He returned the testimony with his findings, under one and the same cover, marked by him "Report of referee." (Rec. 77). The report and the testimony annexed to and forming part of it was offered in evidence by counsel for the defendant (Rec. 32). It is manifest that such was the extent of the offer. Counsel for the plaintiff had already offered in evidence the findings of Mr. Johnson (Rec. 26), and objection was made (Rec. 30) to such offer on the ground that the whole report, and such papers and evidence as appeared attached thereto, should be offered with it, if offered at all. The findings of the referee being already in evidence at the instance of the plaintiff, it was not the intention of the defendant to again introduce those findings without also introducing the papers annexed to them and under the same cover. No reasonable purpose can be assigned for the defendant to again offer the findings of the referee in evidence unless it was to get in the accompanying papers, which had not been offered by the other side. The statement by the trial justice (Rec. 77) that the evidence so called (meaning the evidence annexed to Mr. Johnson's report) is not part of the report, and was not included in the offer, is incorrect as matter of law and is not justified by the record.

V.

It was error to admit in evidence the report of Mr. Johnson as an award. Even if his report could be

considered as an award, it lacks the element of mutuality; the plaintiff sues as an administratrix; as such, she was without power to submit alleged differences to arbitration. An administrator has no such authority. By statute his powers as to the collection or payment of claims are restricted.

Clark *vs.* Hogle, 52 Ill., 427.

It may be claimed that such authority exists under the Maryland statute, because the statute only provides the method of proceeding in regard to claims against the estate of a deceased; but the reason assigned for the refusal of the power to an administrator in Maryland to submit a claim against the estate to arbitration without the previous authority of the court, and without the formalities of the statute, is equally potent in the case of a claim in favor of the estate, the reason being that by such submission the assets might be reduced by the payment of costs and expenses to the prejudice of creditors and distributees.

Nor had the Commissioners of the District of Columbia the right or authority to submit said matters of difference to arbitration. While it may be conceded that a municipal corporation, with power to contract, with liability upon the contract, may generally have power to submit to arbitration, yet this defendant cannot, because of the limitations imposed upon it by the act of Congress of June 11, 1878, establishing the present form of government. It might consent in a pending cause to refer the question in dispute to arbitration, because being a party to an action in court, with power to sue and be sued, it might lawfully take any step that an individual might, under like circumstances, to bring the cause to final judgment.

Alexandria Canal Co. *vs.* Swan, 5 How., 83.

The presumption is that the Commissioners did what they might lawfully do. That is, in a pending suit, agreed to refer it to Johnson for his *report* to enlighten the court with reference to its conclusion and to speed the disposition of the controversy. There is no presumption that the Commissioners undertook to do an unlawful thing, OMNIA RITE ACTA PRAESUMUNTUR. No such authority was reposed in the Governor or Board of Public Works, to whose authority they succeeded. The act of 1878, establishing a permanent form of government for the District of Columbia (Rich. Supp. Rev. Stat. U. S., 145), section 3 declares: "But said Commissioners * * * shall make no contract nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress." And by section 13 it is declared to be a high misdemeanor for any officer to knowingly increase the indebtedness of the District of Columbia except as authorized by that act.

The report or so-called award is *uncertain*. "I do therefore find (says the referee) that there is due to the plaintiff from the defendant the sum of $10,519.20, besides costs, $550. "Besides costs!" What costs? Again the referee reported in favor of the "Plaintiff." Nowhere in his report does the referee mention who the plaintiff is or who the defendant is. The caption of the report, being the title of the cause in which he filed the same, is *Davis W. Bailey vs. The District of Columbia.* The plaintiff in her present case, in her declaration (Rec. 1), avers that she, as *administratrix of Davis W. Bailey*, had brought a suit at law in the supreme court of the District of Columbia against the defendant, "for money due and owing to her for work done and materials furnished to the defendant

by Davis W. Bailey during his lifetime, and to put an end to the differences the parties submitted to the arbitration and award of J. J. Johnson, Esq., who made an award in writing between the plaintiff, administratrix of the estate of Davis W. Bailey, deceased, and the defendant." It is manifest that Johnson's report or award was not in any matter in which *she*, as *administratrix*, was concerned. If, to render his finding intelligible, resort can be had to the caption of the paper to determine and ascertain who is "the plaintiff" to whom he finds and reports there is due "The sum of $10,519.20, besides costs" (Rec. 30), we find it is not the present plaintiff.

IT APPEARS ON THE FACE OF MR. JOHNSON'S REPORT THAT HE ALLOWED THE VERY LARGE SUM OF $6,079.05 FOR EXTRA WORK, WITHOUT BEING ABLE TO JUSTIFY SUCH FINDING BY THE WRITTEN AUTHORITY OF THE COMMISSIONERS.

Assuming, for the sake of argument, that the report of Mr. Johnson may be considered as an award, having disclosed the ground of his findings the court has authority to inquire into the correctness of those findings.

1 A. & E. Ency. 675, and cases.

In the State of Maryland, and under the act of 1778, ch. 21, par. 17, it has been decided over and over again that upon the general principles of arbitration and award if an arbitrator discloses in his award the ground of his decision the same is reviewable, and, if contrary to law, may be set aside.

State *vs.* Williams, 9 Gill., 172.
Oliver *vs.* Heep, 2 H. & M., 479.
Hewitt *vs.* The State, 6 H. & J., 97.
Goodsmith *vs.* Daly, 1 Id., 361.

Tillard's Lessee *vs.* Fischer, 3 H. & M., 118.
Woods *vs.* Matchett, 47 Md., 390.

And this is the settled doctrine in other jurisdictions.

Morse on Arbitration and Award, 326.

So it seems it would be for such reasons reported in any other authentic manner to the court.

Kent *vs.* Elstof, 3 East, 18.
Knox *vs.* Walton, 2 Wash., 507.
Kelly *vs.* Johnson, 3 Id., 47.

Or, where accompanying an award is a paper which discloses the grounds taken by the arbitrator in forming his opinion of the subject, wherein he committed a mistake in point of law between the parties.

Hewitt *vs.* The State, 6 H. & J., p. 97.

"If herein the arbitrators mistook the law, and because of that mistake have given an award in favor of the defendants, and this be shown by the award, the court has the power and was bound to set aside the award."

Stobe *vs.* Calvert, 9 Gill., 175.

"Where it clearly appears upon the face of an award, or by the evidence of the arbitrators, that in making the award there was a mistake in a matter of fact, it is a valid objection to the award."

Conger *vs.* James, 32 Tenn., 215.
Billings on Awards, p. 61.

In order to effectuate the intention of the parties in the matter of arbitration, Rule 72 of the court below

provides as follows: "Wherever an award has been returned by the arbitrator and approved by the court in the manner directed (by Rule 51), judgment shall be entered thereon."

The court cannot be said to approve of an award unless it is placed in a position to know that the award ought to be approved. A submission under a statute which requires the court to "approve" the award gives the court power to inquire into the decision of the arbitrators as regards matters of law.

Allen *vs.* Miles, 4th Harr. (Del.), 234.

If a statute or rule under which a submission is entered into requires the court "to approve," it is essential that the award shall be good in point of law.

Morse on Arbitration and Award, p. 303.

In the absence of statute, under the reference in this case, the rule laid down by Field, J., in Lumber Co. *vs.* Buchtel (101 U. S. 637), should be applied, "The *finding should have the precision of a special verdict, and specify with distinctness the facts found and not leave them to be inferred.*"

See also the case of Belmont *vs.* Railroad Company (3 Mackey, 357), wherein it was held that an agreement of parties by their attorneys to refer a pending case to a special referee "whose award, when approved by the court, is to be its judgment, was not within the Maryland act." In that case, as in this, the referee "took testimony and made an award in which the facts established by the testimony are stated at large with his conclusions of law." Exceptions were filed to this award and a motion made to enter judgment thereon. The judge holding the circuit court denied the motion to

enter judgment and sustained the exceptions to the award and set it aside, and from that order an appeal was taken. In sustaining a motion to dismiss, the court used this language: "If it had been a reference to arbitration under the rules of the court, or under the Maryland act, which authorized reference to arbitration, the effect of the award would have been entirely different from the one contemplated by this order. We can only consider this order as authorizing the referee to report the case to the court for its judgment and as in the nature of a special verdict or an agreed statement of facts. This appears also to have been the construction put upon it by the referee himself, for he reports at large and in great minuteness the facts established by the testimony and the conclusions of law which he thinks ought to be applied to them, so that the court might see the whole case and approve or disapprove of his award. The court exercised that discretion and held that it must be set aside.

"Now, it may be that the attorneys intended to make a reference to arbitration. We know very well what the effect of an award of arbitrators is; that it is final and conclusive on all the facts in the case, and the controversy cannot be inquired into either by the parties or by the court. The duty of the court is a merely formal act then, or nearly so, to enter judgment upon the award. And that makes an award of an arbitrator a practical determination of a controversy."

If the arbitrator professes to decide upon the law and he mistakes it, the court will set aside the award; also where the arbitrator's reasons did not appear upon the face of the award, but only upon another paper delivered therewith.

The act declares "that the award or report of the referee made according to the reference and approved

by the court shall be deemed and taken as available in law as the verdict of a jury. Upon exceptions taken to the award the court cannot approve it, and thus give it the effect of a verdict without information of the matters which came under the cognizance of the arbitrators * * *. where it manifestly appears that arbitrators have clearly mistaken the law, or that they knew what the law was and purposely disregarded it, or that they have made an evident mistake in matters of fact, the court is bound to set aside an award, as they are to set aside a verdict which is manifestly against the law and facts."

Allen *vs.* Smith, 4 Harr. (Del.), p. 236.

"If every door is to be closed against the courts arriving at the knowledge of the facts upon which the referee decided, I should strongly incline to doubt whether this mode of trial would deserve one-half the encomiums passed upon it. It would be to say that whatever may be the degree of injustice committed by the mistakes of arbitrators, yet the court must approve and give validity to those mistakes if the referees have been cautious enough not to spread them upon the face of the award."

Hurst *vs.* Hurst, 1 Wash. C. Ct., 60.

The court in the last cited case must have cast its prophetic eye to this jurisdiction and have seen the case at bar.

"The sacredness of awards ought not to be extended beyond that of verdicts; it must justify the court in putting them upon the same footing when errors are suggested in clear points of law or facts."

Williams *vs.* Craig, 1 Dall., 315.

"The principles on which a court proceeds with regard to exceptions to awards are well established. They will set aside an award for error in law or manifest error of fact."

Tilghman, C. J., in Gove *vs.* Reed, 4 Yeates, 461.

"But," said that learned judge (Large *vs.* Passemore, 5 S. & R., 52), "where the point turns on the construction of the writing the court considers the writing and corrects the error, if it appears that the referee has been mistaken.

"So also the error is to be corrected if the principles on which the award is founded are contrary to law."

The law was also applied by the general term of the supreme court of the District of Columbia in the case of Strong *vs.* Clarke, Exr., at law, No. 16,232 (not reported), where the order of reference was:

"It is this 18th day of December, 1877, ordered, that the above exhibited cause be, and the same hereby is, submitted and referred to the arbitration and award of James G. Payne, saving all rights that now exist." With the award in this case there was submitted a stenographer's report of all that took place before the referee and his rulings thereon—the same course that was pursued in the present case, and the court reviewed the award in that case.

So in the United States *vs.* Farragutt (22 Wall., 420), where a report or an award was made in the cause and it was held that it would be construed by the same general principles which would govern it in a court of common law or equity. "Nor do we conceive," says Mr. Justice Miller, delivering the opinion of this court, "notwithstanding the expression in the agreement of submission that all questions of law in the case are

concluded by the award. * * * The award was also liable, like any other award, to be set aside in the court below for such reasons as are sufficient in other courts, for exceeding the power conferred by the submission for manifest mistakes of law." As was said by the court in Buckingham *vs.* Payne (36 Barb., 81), "the facts found by the referee must sustain his finding upon the law, and the law of the case must be predicated upon such finding of facts." Tested by this standard, the report of Mr. Johnson is absolutely unfounded in law or in fact, and instead of finding for the plaintiff he should have found for the defendant.

VII.

THE LEGAL EFFECT OF THE ACTS OF THE RESPECTIVE PARTIES REGARDING THE CONDUCT AND DISPOSITION OF THE CASE WAS A MATTERF OR DETERMINATION BY THE COURT, AND NOT BY THE JURY.

The court manifestly erred in granting the plaintiff's prayer (Rec. 40-41), which was based on oral testimony as to the intention of the parties and was supplementary to their alleged written agreement, and left to the jury the question whether Mr. Johnson "intended to make a final finding in the case in pursuance of said agreement between the parties," and the further question whether the parties intended to submit to arbitration.

If the report had been improperly filed in the case leave should have been prayed to take it off the files.

VIII.

The trial court should have directed a verdict for the defendant as prayed (Rec. 41). The order of the Com-

missioners appointing Mr. Johnson referee, and the conduct of the parties subsequent thereto, and the record in the original cause showed conclusively that it was not the intention that Mr. Johnson should make an award, but only a report which should be *advisory* to the court and the basis of its judgment in the original cause.

It is manifest that no judgment against the District could have been properly entered in the original cause, on Mr. Johnson's report, and the evidence returned with it, which consisted of the report of *Lieut. Greene* for the defendant (Rec. 75), and the disposition of *Francis D. Bailey* (Rec. 48 to 75), for the plaintiff. From Lieut. Greene's report it appears that the amount of paving awarded to the *Bailey-French Paving Company* for resurfacing certain streets was 45,537 square yards, on which the contract price varied from 82 cents to $1.05 per square yard, amounting in all to $40,950.86; the contractor was to do all extra work that might become necessary in consequence of a change of plans during the progress of the work. Such change became necessary, and the contractor was notified to execute the work according to the changed plans, and did so without protest, and was paid for the extra work at fair rates, "much more remunerative in fact (says Lieut. Greene) than his rates for resurfacing." In consequence of a failure to get the necessary appropriation from Congress the contractor was notified, February 12, 1880, that so much of the contract as applied to Mount Vernon square, from Seventh to Ninth streets west, and Pennsylvania avenue, from Sixth to Eighth streets east, was revoked, the Commissioners having no funds to pay for the same. Up to this time the contractor had been paid $5,748.14 for extra work, making the total amount received under the contract $35,-

963.18, as against $40,950.86, the estimated cost of the entire work. The difference (says Lieut. Greene) of about $5,000 is not unusual as between the estimated and actual amount of work. "Mr. Bailey was paid in full for all work done by him at the rates named by him in the contract, which he voluntarily proposed and signed." As against the statement of Lieut. Greene, we have the testimony of *Francis D. Bailey*, the plaintiff's son, who says he was the foreman at the factory of the contractor, that is to say, the place where the material for the pavement was prepared, and that his business frequently called him upon the street. He thought the contractor would have made about $5,000 on the part of the contract which was not executed. He based this estimate on figures he had made in other cases. This witness had forgotten the streets to be improved under the contract, and refreshed his memory from memoranda which he said he had made from the contract some days before he gave his testimony.

It would be absurd to contend that the testimony returned by Mr. Johnson with his report furnishes any basis for his findings. It is not surprising, then, that additional counsel for the plaintiff, after filing a motion to confirm the report of Mr. Johnson, should, on reflection, change his mind and bring a new suit. He knew perfectly well there could be no recovery against the District in the original cause if the report of Mr. Johnson was to be the basis of that recovery. It was a very shrewd move to undertake to extricate the plaintiff from the predicament the case had gotten into, to treat Mr. Johnson's report as an award, and bring a new suit to recover the amount of his findings. By this means the plaintiff might recover, a thing she could not do in the original cause, if it was to be de-

cided on the basis of Mr. Johnson's report and the evidence returned with it.

Now, the question is, can the District be mulcted in a judgment for $10,519.20 with interest from the 18th day of July, 1892, by this jugglery with judicial proceedings? We do not believe that courts of justice were instituted for any such purpose.

The judgment of the court below should be reversed with directions to enter judgment for the defendant in this case.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
For District of Columbia, Defendant in Error.